

**Before the
Federal Communications Commission
Washington, D.C.**

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In the matter of

Public Interest Obligations
Of TV Broadcast Licensees

MM Docket No. 99-360

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**COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.**

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March 27, 2000

SUMMARY

The Commission ought do no more than clarify its current rules as necessary to apply them to local television stations' digital service. No reason exists to tamper with the success of the current regulatory regime. Under the Commission's current body of "public interest" requirements, local television stations' analog services have become the primary sources of news, information, and entertainment in their communities. Now, local television stations all across the country are investing heavily in the new digital facilities which will assure their full-fledged participation in the digital age. They are poised not only to maintain broadcast television as the pre-eminent video service to all consumers, but also to provide an expansive array of new and innovative services. This will occur not by virtue of any governmental decree. It will occur because the same licensees that have created and constantly re-created analog broadcast television as an invaluable service to consumers will be in an even better position with their digital facilities to respond to the public's demand for credible news, reliable information, and quality entertainment. Therefore, the Commission should maintain its current definition of local television stations' public interest obligations with appropriate clarifications to conform their application to the capabilities of digital broadcast television.

Any other course would plunge the Commission into the abyss of the arbitrary, capricious, and unlawful. First, a material redefinition or expansion of the public interest obligations of local television stations today would be premature. Digital television broadcasting is an infant service, struggling not only to find its identity, but also just to breathe in an uncertain, even hostile, environment. Demonstrable off-air reception problems are under investigation. Cable carriage is far from assured. Delays in standard setting have arrested receiver manufacture and sales. Meanwhile, the video marketplace offers a greater competitive

challenge every day as cable and satellite carriers employ digital transmission; the Internet becomes increasingly friendly to full motion video, and the capabilities of the broadband world beckon. In this circumstance, one hardly has any rational basis for alleging some seminal failure on the part of local television stations to provide a digital service that comports with their public interest obligations. Furthermore, the distraction of coping with new, more exacting public interest obligations would diminish local television stations' attention to the true task at hand – the expeditious deployment and successful development of a digital television broadcasting service that reflects their continuing and ongoing commitment to their communities and the public.

Second, preconceived notions of how digital broadcast television could provide public interest benefits would stifle creativity, experimentation, and innovation. The Commission rightly has embraced an open and flexible regulatory regime for digital broadcasting, precisely to allow local television stations to assess consumer interests and respond nimbly in a marketplace unfettered by regulatory directives based on the government view of what the public needs or demands. A dramatic reversal of course would be difficult to explain or justify. Moreover, it would be counterproductive. Local television stations want to succeed in a digital world. They have every incentive to experiment and innovate so as to provide the public with the services it needs and demands. With the freedom to do so, they can bring about the transformation of broadcast television to an even more vital and responsive servant to the needs and interests of the viewing public.

Third, the Commission's authority in the realm of broadcast program content is tightly constrained. No matter how well-intended or appealing the Commission's notions of what television programming should be, Congress never invested it with more than a very minimal

supervisory role over broadcast program content. The strictures of the First Amendment and the Communications Act generally relegate the Commission to review of local television stations' *overall performance* in the public interest. They leave no room for the Commission to dictate the types or amounts of programs which local television stations must broadcast. These limitations on the Commission's authority hardly evaporate in the hail of digital packets that will convey broadcast programming to viewers. Therefore, the Commission should step warily lest it stub its toe on the well established and unyielding curbs on its power over broadcast program content.

In view of the above, the proper course for the Commission is the simple, straightforward reiteration that a licensee's public interest obligations remain essentially unchanged in the transition from analog to digital broadcasting. Only minor clarifications in existing rules need be made to accommodate them to the expanded capabilities of digital broadcasting. In particular, with respect to local television stations providing multiple channels of free, broadcast programming, ALTV posits:

- A local television station's compliance with its public interest obligations on its digital channel should be based on an evaluation of its overall programming performance across all free, broadcast digital services. For example, the station should not be required to provide educational and informational programming for children on *each* channel. Such a requirement would pre-empt licensee decisions to provide specialized channels, such as a children's channel, a news channel, or a "soap-box" channel.
- A local television station's compliance with the political broadcasting "reasonable access" requirement should be assessed across all channels. Such programming should not be confined to one channel or mandated on every channel. Again, for example, political candidates likely would gain nothing from gaining "reasonable access" to a channel devoted to children's programming.
- Other political broadcasting requirements (*i.e.*, equal opportunities and lowest unit charge) would apply to each channel. For example, a candidate requesting equal opportunity would be entitled to comparable time on the same channel as the political appearance triggering the equal opportunity requirement.
- Prohibitions or restrictions on obscene or indecent program content and children's advertising, as well as the sponsorship identification and similar rules should apply to each free, broadcast channel.

Finally, consistent with section 336(b)(3), ancillary and supplementary services should be regulated like analogous services, rather than subjected to a licensee's overall public interest obligations.

ALTV urges the Commission to proceed with the restraint commanded by the circumstances and the law. This is no time to crash a party that has not begun.

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The Association of Local Television Stations, Inc. ("ALTV"), hereby submits its comments in response to the Commission's *Notice of Inquiry* in the above-captioned proceeding.¹ ALTV is a non-profit, incorporated association of local television stations that are not affiliated with the ABC, CBS, or NBC television networks.

A broadcast television station licensee's public interest obligations properly are unquestioned in this proceeding. Congress, the Commission, and the broadcast television industry have embraced this core element of broadcast regulation. The debate initiated in this proceeding, was previously – and properly – described by the Commission, as follows:

Some argue that broadcasters' public interest obligations in the digital world should be clearly defined and commensurate with the new opportunities provided by the digital channel broadcasters are receiving. Others contend that our current

¹ FCC 99-390 (released December 20, 1999) [hereinafter cited as *Notice*]

public interest rules need not change simply because broadcasters will be using digital technology to provide the same broadcast service to the public.²

ALTV respectfully submits that the Commission ought to do no more than clarify its current rules as necessary to apply them to local television stations' digital service. No reason exists to tamper with the success of the current regulatory regime.

I. INTRODUCTION

Under the Commission's current body of "public interest" requirements, local television stations' analog services have become the primary sources of news, information, and entertainment in their local communities. This is no secret to the Commission, which readily acknowledges as much at the top of its *Notice*.³ Indeed, the Commission goes on to state that "many broadcasters have served the public interest in numerous ways over the years" and that "many television broadcasters have demonstrated a strong record of community service."⁴ As the Commission recognized earlier in its consideration of the DTV rules of the road:

Broadcast television's universal availability, appeal, and the programs it provides -- for example, entertainment, sports, local and national news, election results, weather advisories, access for candidates and public interest programming such as education television for children -- have made broadcast television a vital service. It is a service available free of charge to anyone who owns a television set, currently 98% of the population.⁵

Now, local television stations all across the country are investing heavily in the new digital facilities which will assure their full-fledged participation in the digital age.⁶ They are poised not

²*Fifth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 12809, 12830 (1997) [subsequent history omitted] [hereinafter cited as *Fifth Report and Order*]. Therein the Commission also observed, "We are not resolving this debate today. Instead, at an appropriate time, we will issue a Notice to collect and consider all views." *Id.*

³ *Notice* at ¶1 ("Television is the primary source of news and information to Americans, and provides hours of entertainment every week.").

⁴ *Notice* at ¶¶8,21.

⁵ *Fifth Report and Order*, 12 FCC Rcd at 12820.

⁶ *Notice of Proposed Rule Making*, MM Docket No. 00-39, FCC 00-83 (released March 8, 2000) at ¶¶1,5 [hereinafter cited as *DTV Review*].

only to maintain broadcast television as the pre-eminent video service to all consumers, but also to provide an expansive array of new and innovative services. Again, the Commission has stated:

DTV holds the promise of reinventing free, over-the-air television by offering broadcasters new and valuable business opportunities and providing consumers new and valuable services. DTV broadcasters will have the technical capability and regulatory flexibility to air high definition TV (HDTV) programming with state-of-the-art picture clarity; to “multicast” by simultaneously providing multiple channels of standard digital programming and/or HDTV programming; and to “datacast” by providing data such as stock quotes, or interactive TV via the DTV bitstream.⁷

This promise will be fulfilled not by virtue of any governmental decree. The theoretical benefits of digital broadcasting will move from the drawing board to the marketplace because the same licensees that have created and constantly re-created analog broadcast television as an invaluable service to consumers will be in an even better position to respond to the public’s demand for credible news, reliable information, and quality entertainment. Thus, the Commission’s current regulatory regime has been successful.

For this reason alone, the Commission should be reticent to re-invent the wheel by redefining, expanding, or "micro" defining local television stations’ public interest obligations. Furthermore, as set forth below, any other course would plunge the Commission into the abyss of the arbitrary, capricious, and unlawful. Therefore, the Commission should maintain its current definition of local television stations’ public interest obligations with appropriate clarifications to conform their application to the capabilities of digital broadcast television.

II. REVISIONS TO THE PUBLIC INTEREST OBLIGATIONS OF LOCAL TELEVISION STATIONS AT BEST WOULD BE PREMATURE.

Any material redefinition or expansion of the public interest obligations of local television stations today would be premature. Digital television broadcasting is an infant service, struggling not only to find its identity, but also just to breathe in an uncertain, even hostile,

environment. Rather than strap digital broadcasting with new regulatory obligations, the Commission should pay heed to its own “overarching goal ... to promote the success of free, local television service using digital technology.”⁸

First, the distraction of coping with new, more exacting public interest obligations would diminish local television stations’ attention to the true task at hand – the expeditious deployment and successful development of a digital television broadcasting service that reflects their continuing and ongoing commitment to their communities and the public. As the Commission recognized when it launched an aggressive transition schedule, “while the opportunities afforded by digital technology are great, so are the risks.”⁹ Local television stations already are coping with considerable risks, many of which were anticipated, some of which were not. The transition to digital broadcasting remains plagued and delayed by uncertainty.¹⁰ Demonstrable off-air reception problems are under investigation. The Commission itself recently sought comment on this critical issue.¹¹ Moreover, in just the past few days, the Advanced Television Standards Committee (“ATSC”), which developed the current 8VSB transmission standard, initiated its own investigation and analysis of reception problems.¹² ATSC Chairman Robert Graves reportedly stated, “We know this debate is going on and there’s going to be a lot more debate

⁷ Notice at ¶3, citing *Fifth Report and Order*.

⁸ *Fifth Report and Order*, 12 FCC Rcd at 12820.

⁹ *Fifth Report and Order*, 12 FCC Rcd at 12811.

¹⁰ As real as these problems are, they also must be kept in perspective. The appearance of unanticipated bumps in the road hardly should be a surprise. Anyone who remembers purple hair on green faces (in a pre-*Simpsons* era) during the early years of color television could attest to the inevitability of debugging and improving the system. Ultimately, of course, color television was a brilliant success. No doubt, in the years ahead, the same will be said about digital broadcasting.

¹¹ *DTV Review* at ¶¶11-12.

¹² “ATSC Forms Task Force to Study RF System Performance,” *Communications Daily* (March 22, 2000) at 1-2.

and a lot more study. The reliable reception issue has not gone away.”¹³ At the same time, cable carriage of local television stations’ digital signals is all but non-existent. The Commission is into the second year of its proceeding looking towards implementation of the digital must carry requirement with resolution of the matter as elusive as ever.¹⁴ In short, the ability of consumers to receive digital broadcast signals is in no way assured.

Furthermore, even if a reliable signal could be assured either off-air or via cable, consumers still face uncertainty with respect to the rollout of digital receivers. Delays in standard setting have arrested receiver manufacture and sales. Negotiations over such critical matters as standards and labels for cable-ready sets have plodded to partial success, but only after the Commission finally prodded the parties with threatened proceedings.¹⁵ As a result, cable-ready digital receivers likely will be available for major retail sale campaigns no sooner than the pre-Christmas sales period in 2001.¹⁶ In short, no link in the distribution chain from program acquisition by local television stations to the availability of a picture to view is secure at this point.¹⁷

Meanwhile, the video marketplace offers a greater competitive challenge every day as cable and satellite carriers employ digital transmission; the Internet becomes increasingly friendly to full motion video, and the capabilities of the broadband world beckon. As the Commission realized in establishing the transition timetable:

¹³ *Id.* at 2.

¹⁴ The irony bears mention. The Commission seeks to promote availability of digital service to “all people, including people of all races, ethnicities, and gender, and, most recently, disabled persons.” *Notice* at ¶23. Yet, it has yet to adopt rules assuring that cable subscribers – over 60 per cent of all viewers – enjoy access to all local television stations’ digital signals.

¹⁵ *Id.* at ¶¶ 9-10.

¹⁶ “Consumer Electronics and Cable Agree on DTV-Cable Compatibility,” *Communications Daily* (February 24, 2000) at 1-2.

In recent years, competition in the video programming market has dramatically intensified. Cable, Direct Broadcast Satellite (DBS), Local Multipoint Distribution System (LMDS), wireless cable, Open Video Systems (OVS) providers, and others vie, or will soon vie, with broadcast television for audience. Many operators in those services are poised to use digital. Some, like DBS, actually transmit digitally today but must convert the signals to analog NTSC service for display on home receivers, while others have plans to implement digital technology in the future.¹⁸

Meanwhile, local television stations are required to proceed with plans to construct their DTV facilities.¹⁹ Millions of dollars are being invested by local television stations just to transmit a digital signal, despite enormous uncertainty over access to programming to transmit and access to an audience to view it. None of this is to complain about or seek any delay in the transition schedule. As the Commission well knows, “Broadcasters have long recognized that they must make the switch to digital technology.”²⁰

At the same time, none of this suggests the need to place new, different, or more demanding public interest obligations on local television stations. The Commission itself has embraced the wisdom of restraint:

We recognize the challenges that will be faced by broadcasters in adopting this new technology. Accordingly, we have generally refrained from regulation and have sought to maximize broadcasters' flexibility to provide a digital service to meet the audience's needs and desires.

Local television stations have plenty to cope with just getting the system up and running in a timely fashion. Their efforts should not be diverted to complying with new, more exacting – and needless – public interest obligations.

¹⁷ Significant details of the Commission's regulatory scheme also remain unsettled. *See, e.g., DTV Review, passim.*

¹⁸ *Fifth Report and Order*, 12 FCC Rcd at 12811.

¹⁹ As the Commission observed, “[G]iven the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to encourage broadcasters to offer digital television as soon as possible.” *Fifth Report and Order*, 12 FCC Rcd at 12812.

²⁰ *Fifth Report and Order*, 12 FCC Rcd at 12811.

own investigation and analysis of reception problems.¹² ATSC Chairman Robert Graves reportedly stated, “We know this debate is going on and there’s going to be a lot more debate and a lot more study. The reliable reception issue has not gone away.”¹³ At the same time, cable carriage of local television stations’ digital signals is all but non-existent. The Commission is into the second year of its proceeding looking towards implementation of the digital must carry requirement with resolution of the matter as elusive as ever.¹⁴ In short, the ability of consumers to receive digital broadcast signals is in no way assured.

Furthermore, even if a reliable signal could be assured either off-air or via cable, consumers still face uncertainty with respect to the rollout of digital receivers. Delays in standard setting have arrested receiver manufacture and sales. Negotiations over such critical matters as standards and labels for cable-ready sets have plodded to partial success, but only after the Commission finally prodded the parties with threatened proceedings.¹⁵ As a result, cable-ready digital receivers likely will be available for major retail sale campaigns no sooner than the pre-Christmas sales period in 2001.¹⁶ In short, no link in the distribution chain from program acquisition by local television stations to the availability of a picture to view is secure at this point.¹⁷

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¹⁷ Significant details of the Commission’s regulatory scheme also remain unsettled. *See, e.g., DTV Review, passim.*

Meanwhile, the video marketplace offers a greater competitive challenge every day as cable and satellite carriers employ digital transmission; the Internet becomes increasingly friendly to full motion video, and the capabilities of the broadband world beckon. As the Commission realized in establishing the transition timetable:

In recent years, competition in the video programming market has dramatically intensified. Cable, Direct Broadcast Satellite (DBS), Local Multipoint Distribution System (LMDS), wireless cable, Open Video Systems (OVS) providers, and others vie, or will soon vie, with broadcast television for audience. Many operators in those services are poised to use digital. Some, like DBS, actually transmit digitally today but must convert the signals to analog NTSC service for display on home receivers, while others have plans to implement digital technology in the future.¹⁸

Meanwhile, local television stations are required to proceed with plans to construct their DTV facilities.¹⁹ Millions of dollars are being invested by local television stations just to transmit a digital signal, despite enormous uncertainty over access to programming to transmit and access to an audience to view it. None of this is to complain about or seek any delay in the transition schedule. As the Commission well knows, "Broadcasters have long recognized that they must make the switch to digital technology."²⁰

At the same time, none of this suggests the need to place new, different, or more demanding public interest obligations on local television stations. The Commission itself has embraced the wisdom of restraint:

We recognize the challenges that will be faced by broadcasters in adopting this new technology. Accordingly, we have generally refrained from regulation and have sought to maximize broadcasters' flexibility to provide a digital service to meet the audience's needs and desires.

¹⁸ *Fifth Report and Order*, 12 FCC Rcd at 12811.

¹⁹ As the Commission observed, "[G]iven the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to encourage broadcasters to offer digital television as soon as possible." *Fifth Report and Order*, 12 FCC Rcd at 12812.

²⁰ *Fifth Report and Order*, 12 FCC Rcd at 12811.

Local television stations have plenty to cope with just getting the system up and running in a timely fashion. Their efforts should not be diverted to complying with new, more exacting – and needless – public interest obligations.

Second, new public interest obligations would be premature because no rational basis exists for alleging some seminal failure on the part of local television stations to provide a digital service that comports with their public interest obligations.²¹ Digital broadcasting is nowhere close to being a mature service. It is gasping for air in the first few moments of its infant existence. No basis for judgment exists.²² No problem can be defined which calls for regulatory intervention, and regulatory responses to nonexistent problems invite judicial rebuke.²³ In the same vein, adopting new, detailed public interest requirements would be markedly inconsistent with the Commission's insistence on flexibility and reliance on a marketplace response to mold

²¹ The pertinence of the Commission's statements about alleged shortcomings in the performance of local television stations misses the point. *See, e.g., Notice* at ¶36. First, it says nothing about how stations are responding to their public interest obligations on their *digital* channels. Second, the failure of stations to comply with existing public interest obligations does not speak to the adequacy of the rules embodying those obligations. Third, if, indeed, stations are letting their communities down, why have viewers in their communities not employed existing processes to voice their complaints at the Commission? ALTV suspects that the viewing public, when all is said and done, is quite happy with the service provided by broadcast television. Finally, the Commission over the years has taken every opportunity to establish and promote competition from new multichannel services, such as cable television and DBS. Ted Turner may decry the fact that three times as many people watch The Cartoon Channel as watch CNN, and more enlightened souls may ask the government to force broadcast television stations to air more news and fewer cartoons. However, in today's competitive multichannel environment, consumers will be able – and will – watch what they want to watch in large part because the Commission has striven to provide them the opportunity to do so!

²² How might the Commission articulate a “rational connection between the facts found and the choice made,” when no factual history or record exists? *Motor Vehicle Mfr. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29,43 (1983), *quoting Burlington Northern Truck Lines, Inc., v. United States*, 371 U.S. 156, 168 (1962).

²³ *See, e.g., Home Box Office, Inc. v. Federal Communications Commission*, 567 F. 2d 9, 36 (D.C. Cir. 1977) (“[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.”).

DTV services.²⁴ Such a complete turnaround in regulatory approach would defy explanation.²⁵

Again, the pen barely has hit the paper in writing the performance history of local television stations' digital service. The still blank pages of digital history offer no basis for reversals of regulatory policies embraced only yesterday.

Finally, of course, local television stations' digital channels will enjoy no reprieve from the duties incumbent on licensees to operate in the public interest. The Commission has left no doubt that "existing public interest requirements continue to apply to all broadcast licensees."²⁶

Therefore, the Commission should refrain from premature review and revision of its public interest regulations.

III. MORE EXPANSIVE AND DETAILED PUBLIC INTEREST REQUIREMENTS WOULD STIFLE INNOVATION.

Preconceived notions of how digital broadcast television could provide public interest benefits would stifle creativity, experimentation, and innovation. The Commission rightly has embraced an open and flexible regulatory regime for digital broadcasting, precisely to allow local television stations to assess consumer interests and respond nimbly in a marketplace unfettered by regulatory directives based on the government view of what the public needs or demands. This has been the Commission's mantra. The Commission has envisioned local television stations providing a "variety of services" due to "economic incentives provide programming and services that will attract consumers to DTV."²⁷ It deliberately has crafted a

²⁴ See Section III, *infra*.

²⁵ As the court stated in *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 852 (D.C. Cir. 1970), "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerable terse to the intolerably mute."

²⁶ *Fifth Report and Order*, 12 FCC Rcd at 12830. See also *Notice* at ¶4, citing 47 U.S.C. §336(d).

²⁷ *Fifth Report and Order*, 12 FCC Rcd at 12817, 12833.

regulatory scheme characterized by flexibility in order to enable stations to respond to marketplace dynamics rather than unyielding governmental dictates. Thus, the Commission has stated:

Digital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital. In addition, broadcasters' ability to adapt their services to meet consumer demand will be critical to a successful initiation of DTV.

* * * *

Our decisions today ... ensure that broadcasters have more flexibility in their business. Broadcasters will be able to experiment with innovative offerings and different service packages as they continue to provide at least one free program service and meet their public-interest obligations. We choose to impose few restrictions on broadcasters and to allow them to make decisions that will further their ability to respond to the marketplace.²⁸

The Commission ultimately concluded that

Digital television will enter a highly competitive, challenging telecommunications marketplace. Our decisions in this Report and Order, designed to foster technological innovation and competition, while minimizing government regulation, will, we hope, increase the likelihood that we will see a digital television service that provides a host of new and beneficial services to the American public, while preserving free universal television service that serves the "public interest, convenience, and necessity."²⁹

A dramatic reversal of course not only would be difficult to explain or justify, but also would be counterproductive. Local television stations want to succeed in a digital world. They have every incentive to experiment and innovate so as to provide the public with the services it needs and demands. With the freedom to do so, they can bring about the transformation of broadcast television to an even more vital and responsive servant to the needs and interests of the viewing public.

²⁸ *Fifth Report and Order*, 12 FCC Rcd at 12812.

²⁹ *Fifth Report and Order*, 12 FCC Rcd at 12857.

IV. EXPANSIVE DETAILED RULES DEFINING LOCAL TELEVISION STATIONS' PUBLIC INTEREST OBLIGATIONS WOULD EXCEED THE COMMISSION'S AUTHORITY.

The Commission's authority in the realm of broadcast program content is tightly constrained. No matter how well-intended or appealing the Commission's private notions of what television programming should be, Congress never invested it with more than a very minimal supervisory role over broadcast program content. The strictures of the First Amendment and the Communications Act generally relegate the Commission to review of local television stations' overall performance in the public interest. They leave no room for the Commission to dictate the types or amounts of programs which local television stations must broadcast. These limitations on the Commission's authority hardly evaporate in the hail of digital packets that will convey broadcast programming to viewers. Therefore, the Commission should step warily lest it stub its toe on the well established and unyielding curbs on its power over broadcast program content.

Whereas the Commission describes the public interest standard as a "supple instrument," it must fall back to 60 year old case law – and ignore more recent pronouncements by the Court.³⁰ More recently, the Court has emphasized the very limited nature of the Commission's authority over program content in particular. In 1972, the Court stated that "the Government's power over licensees ... is by no means absolute and is carefully circumscribed by the Act itself."³¹ Therein the Court left no doubt that the Commission's authority extended only to the point of evaluating a local television station's *overall performance*:

³⁰ Notice at ¶8, n. 36.

³¹ *Columbia Broadcasting System, Inc., v. Democratic National Committee*, 412 U.S. 94, 126 (1972).

Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard.³²

The Court reiterated that a licensee may be "held accountable for the totality of its performance of public interest obligations."³³

In *Turner Broadcasting System v. FCC*, 512 U.S. 622; 114 S. Ct. 2445; 1994 U.S. LEXIS 4831, 53; 129 L. Ed. 2d 497; 62 U.S.L.W. 4647; 75 Rad. Reg. 2d (P & F) 609, 53 (1994), [emphasis supplied], the Court confirmed the Commission's limited authority over broadcast program content, rejecting arguments that the cable must carry rules were content-based:

[T]he argument exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming. The FCC is forbidden by statute from engaging in "censorship" or from promulgating any regulation "which shall interfere with the [broadcasters'] right of free speech." 47 U.S.C. § 326. The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it "has no authority and, in fact, is barred by the First Amendment and [§ 326] from interfering with the free exercise of journalistic judgment." *Hubbard Broadcasting, Inc.*, 48 F.C.C.2d 517, 520 (1974). In particular, *the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear."* Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960); see also *Commercial TV Stations*, 98 F.C.C.2d 1076, 1091-1092 (1984), modified, 104 F.C.C.2d 358 (1986), remanded in part on other grounds sub nom. *Action for Children's Television v. FCC*, 261 U.S. App. D.C. 253, 821 F.2d 741 (CA DC 1987).

* * *

Indeed, our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices. See *FCC v. League of Women Voters of Cal.*, 468 U.S. at 378-380, 386-392 (invalidating under the First Amendment statute forbidding any noncommercial educational station that receives a grant from the CPB to "engage in editorializing"); *Columbia*

³² *Columbia Broadcasting System, Inc., v. Democratic National Committee*, *supra*, 412 U.S. at 120.

³³ *Columbia Broadcasting System, Inc., v. Democratic National Committee*, *supra*, 412 U.S. at 121.

Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 126 (describing "the risk of an enlargement of Government control over the content of broadcast discussion of public issues" as being of "critical importance" to the First Amendment).³⁴

Thus, considerable Supreme Court jurisprudence in recent years has established that the Commission's authority over local television stations' program content decisions is limited to review of their overall performance. It falls well short of encompassing the authority to require broadcast of particular programs or types of programs. Those decisions the law leaves to broadcasters.³⁵

V. THE COMMISSION SHOULD CONSIDER ONLY MINIMAL CLARIFICATIONS OF LICENSEES' PUBLIC INTEREST OBLIGATIONS.

In view of the above, the proper course for the Commission is the simple, straightforward reiteration that licensee's public interest obligations remain essentially unchanged in the transition from analog to digital broadcasting. Only minor clarifications in existing rules need be

³⁴ With respect to noncommercial stations, the Court pointed out that:

What is important for present purposes, however, is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of "educational" programming or any particular "educational" programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirement that their programming serve "the public interest, convenience or necessity." *En Banc Programming Inquiry*, 44 F.C.C.2d 2303, 2312 (1960). The FCC itself has recognized that "a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of stifling the creativity and innovative potential of these stations." *Public Broadcasting*, *supra*, at 751; see also *Public Radio and TV Programming*, 87 F.C.C.2d 716, 728 729, 732, PP29-30, 37 (1981); *Georgia State Bd. of Ed.*, 70 F.C.C.2d 948 (1979).

114 S. Ct. at 2463.

³⁵ None of this addresses a critical underlying issue, namely, the continuing validity of the venerable, but increasingly suspect decision of the Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969).

made to accommodate them to the expanded capabilities of digital broadcasting.³⁶ These clarifications will be necessitated in large part by local television stations' digital capability to transmit multiple channels of free, broadcast television service. As the Commission asks:

Do a licensee's public interest obligations attach to the DTV channel as a whole, such that a licensee has discretion to fulfill them on one of its program streams, or to air some of its public interest programming on more than one of its program streams? Should, instead, the obligations attach to each program stream offered by the licensee, such that, for example, a licensee would need to air children's programming on each of its DTV program streams?³⁷

With respect to local television stations providing multiple channels of free, broadcast programming, ALTV takes the following positions:

First, a local television station's compliance with its public interest obligations on its digital channel should be based on an evaluation of its overall programming performance across all free, broadcast digital services. For example, the station should not be required to provide educational and informational programming for children or news or public affairs programming on *each* channel. If a station were providing multiple simultaneous program services, including a news and public affairs service or a children's programming service, then it should be considered to have fulfilled its obligation to provide issue-oriented programming or children's programming, even if no children's programming or no issue-oriented programming appeared in the other program services offered by the station. Stations should retain the freedom and flexibility to structure their program offerings in the manner they consider most responsive to public demand. This is fully consistent not only with the Commission's approach to digital broadcasting, but also with the recognized limitations on the Commission's authority to regulate

³⁶ As set forth in Section VI, the licensees' public interest obligations should not apply to local television stations' ancillary and supplemental services (as distinguished from their free, broadcast services).

³⁷ Notice at ¶11.

program content.³⁸ Furthermore, as a practical matter, a requirement that examined each channel on its own would pre-empt licensee decisions to provide specialized channels, such as a children's channel, a news channel, or a "soap-box" channel. Therefore, looking to a local television station's overall performance across all its free, broadcast channels is a sound approach from any perspective.

Second, a local television station's compliance with the political broadcasting "reasonable access" requirement should be assessed across all channels. Such programming should not be confined to one channel or mandated on every channel. Candidates may wish to appear on channels other than a station's main broadcast program channel. On the other hand, legitimate reasons may exist to limit candidates' appearances with respect to some specialized channels. Again, for example, political candidates likely would gain nothing from gaining "reasonable access" to a channel devoted to children's programming. Therefore, stations should retain the discretion to make reasonable allocations of time across channels in fulfilling its reasonable access obligations.

Third, other political broadcasting requirements (*i.e.*, equal opportunities and lowest unit charge) would apply to each free, broadcast channel. For example, a candidate requesting equal opportunity would be entitled to comparable time on the same channel as the political appearance triggering the equal opportunity requirement. A candidate purchasing time on any free broadcast channel would be entitled to the lowest unit charge in the same manner now provided on local television stations' single analog channels.

Fourth, prohibitions or restrictions on obscene or indecent program content and children's advertising, as well as the sponsorship identification and similar rules should apply to each free,

³⁸ See Sections III and IV, *supra*.

broadcast channel. The basic rules and prohibitions that leave little room for broadcaster discretion should apply to all content on channels devoted at that time to free, broadcast programming.³⁹

With these minor clarifications, the Commission's existing rules easily may transition to the world of digital broadcasting.

VI. ANCILLARY AND SUPPLEMENTARY SERVICES SHOULD BE REGULATED LIKE ANALOGOUS SERVICES, RATHER THAN SUBJECTED TO A LICENSEE'S OVERALL PUBLIC INTEREST OBLIGATIONS.

The Commission has asked whether a licensee's public interest obligations should apply to it ancillary and supplementary services.⁴⁰ Consistent with section 336(b)(3), ancillary and supplementary services should be regulated like analogous services. They should not be subject to the licensee's public interest obligations. At the outset, Section 336(a)(2) is irrelevant. The phrase, "as may be consistent with the public interest, convenience, and necessity," as used in that section qualifies the *Commission's* authority to adopt rules allowing stations to offer ancillary and supplementary services. It does not speak to the regulations that may be applicable to such ancillary and supplementary services. In other words, the Commission was authorized to adopt regulations that allowed stations to offer ancillary and supplementary services, provided it found it in the public interest for stations to offer such services. The Commission has so interpreted the section, pointing out that "the 1996 Act specifically gives the Commission discretion to determine, in the public interest, whether to permit broadcasters to offer such

³⁹ At times they channel might be devoted to pay services or other ancillary and supplementary (*i.e.*, non-broadcast) services, then the Commission's broadcasting rules would not apply. Section VI, *infra*.

⁴⁰ Notice at ¶13.

services.”⁴¹ Therefore, in reliance on the authority granted in Section 336(a)(2), the Commission decided to permit stations to offer ancillary and supplementary services:

Section 336(b)(2) sets out the specific parameters of our authority to permit ancillary and supplementary services, and the approach we take here fully complies with those parameters. Thus, under Section 336(b)(2), the Commission is required to limit ancillary and supplementary services to avoid derogation of any advanced television services that the Commission may require. The Commission has exercised its discretion and is requiring broadcasters to continue to provide the free over-the-air service on which the public has come to rely. We herein require that any ancillary and supplementary services broadcasters provide will not derogate that required service.

* * * *

Moreover, we believe that the approach we take here will serve the public interest by fostering the growth of innovative services to the public and by permitting the full possibilities of the DTV system to be realized.⁴²

The Commission, therefore, has interpreted Section 336(a)(2) as establishing and defining its authority to allow local television stations to provide ancillary and supplementary services via their digital facilities.

This interpretation also provides for consistency, rather than conflict with Section 336(b)(3). As the Commission has stated, “[S]ection 336(b)(3) simply requires the Commission to ‘apply to any other ancillary and supplementary service such of the Commission’s regulations as are applicable to the offering of analogous services by any other person.’”⁴³ If Section 336(a)(2) were read to apply licensee’s public interest obligations to their ancillary and supplementary services, then it would clash with Section 336(b)(3). The correct interpretation of Section 336(a)(2) avoids this conflict.

⁴¹ *Fifth Report and Order*, 12 FCC Rcd at 12821.

⁴² *Fifth Report and Order*, 12 FCC Rcd at 12821-2.

⁴³ *Notice* at ¶13.

Furthermore, as the Commission recognizes, ancillary and supplementary services are not free, broadcast services.⁴⁴ They are not even “broadcast related.”

Consistent with precedent that has treated telecommunications services provided by an NTSC station other than the regular television program service as ancillary, we will consider as ancillary and supplementary any service provided on the digital channel other than free, over-the-air services. In addition, we will not impose a requirement that the ancillary and supplementary services provided by the broadcaster must be broadcast related.⁴⁵

Consequently, stations’ ancillary and supplementary services are to be subject to a different regulatory regime (like that applicable to analogous services) and to what amount to spectrum fees.⁴⁶

Finally, the development of innovative new services would be discouraged by application of public interest obligations to ancillary and supplementary services. Local television stations would be placed at a disadvantage if their ancillary and supplementary services were subject to fees, analogous regulations, *and* public interest obligations. Adding an extra layer of regulation would serve only to discourage and stifle new and innovative services, contrary to the Commission’s stated goals. The Commission was mindful of this in permitting stations to offer such services in the first place:

[D]igital television promises a wealth of possibilities in terms of the kinds and numbers of enhanced services that could be provided to the public. Indeed, we believe that giving broadcasters flexibility to offer whatever ancillary and supplementary services they choose may help them attract consumers to the service, which will, in turn, hasten the transition. In addition, the flexibility we authorize should encourage entrepreneurship and innovation.⁴⁷

Therefore, local television stations offering new and innovative services should suffer regulation no more stringent than that applicable to their direct competitors.

⁴⁴ *Id.*

⁴⁵ *Fifth Report and Order*, 12 FCC Rcd at 12821.

⁴⁶ *See Notice* at ¶13.

⁴⁷ *Fifth Report and Order*, 12 FCC Rcd at 12822.

VII. CONCLUSION

ALTV urges the Commission to proceed with the restraint commanded by the circumstances and the law. This is no time to crash a party that has not begun.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'James J. Popham', is written over a horizontal line.

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